Office-Supreme Court, U.S.
FILED
SEP 19 1966
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

RECEIVED
SEP 19 1966
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 569

PACIFIC POWER & LIGHT COMPANY,
Petitioner,

vs.

FEDERAL POWER COMMISSION; DEPARTMENT OF FISH AND GAME OF THE STATE OF CALIFORNIA,
Respondents.

Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

GREGORY A. HARRISON
MALCOLM T. DUNGAN
JOHN E. SPARKS
BROBECK, PHLEGER & HARRISON
111 Sutter Street
San Francisco, California

Attorneys for Petitioner Pacific Power & Light Company

September 16, 1966

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	3
Statement	4
Reasons for Granting the Cross-Writ	8
The Commission's Order Is Unsupported by Findings, Reasons or Evidence	8
The Court Has Abridged Pacific's Rights Acquired by Its Settlement Agreement with the Department	12
Conclusion	13
Appendices	

TABLE OF AUTHORITIES CITED

DECISIONS	Pages
Burlington Truck Lines v. United States, 371 U.S. 156 (1962)	10, 11
Federal Communications Commission v. Pottsville Broadcasting Company, 309 U.S. 134 (1940)	8
Lynch v. Griswold, 292 U.S. 571 (1934)	13
Morgan v. United States, 298 U.S. 468 (1936)	11
Secretary of Agriculture v. United States, 350 U.S. 162 (1956)	11
Securities and Exchange Commission v. Chenery Corporation, 318 U.S. 80 (1943)	10, 11
Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958)	8

STATUTES	
California Fish and Game Code, Section 5938	9
Federal Judicial Code, 28 U.S.C. 1254(1)	3
Federal Power Act:	
Section 4(e), 16 U.S.C. 797(e)	4
Section 10(a), 16 U.S.C. 803(a)	3
Section 313(b), 16 U.S.C. 825*l*(b)	3, 6

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

PACIFIC POWER & LIGHT COMPANY,
Petitioner,

vs.

FEDERAL POWER COMMISSION; DEPARTMENT OF FISH AND GAME OF THE STATE OF CALIFORNIA,
Respondents.

Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

If the Court should grant the petition for a writ of certiorari prayed for by the Department of Fish and Game of the State of California (Department) in No. 506, October Term, 1966, which seeks review of the judgment of the United States Court of Appeals for the Ninth Circuit in Nos. 18853, 18954 and 20435, Petitioner Pacific Power & Light Company (Pacific) prays that a cross-writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit in Nos. 18853, 18954 and 20435, to consider the questions raised in this cross-petition.

OPINIONS BELOW

The decision of the Presiding Examiner, issued November 14, 1962, (R. Vol. 2, p. 381)[1] is unreported. Federal Power Commission Opinion No. 381, issued March 14, 1963 (R. Vol. 2, p. 397) is reported at 29 F.P.C. 478 and 47 PUR 3d 398. Federal Power Commission Opinion No. 381-A, rendered on rehearing August 19, 1963, (R. Vol. 2, p. 436), is reported at 29 F.P.C. 478 and 50 PUR 3d 171. The opinion of the Court of Appeals for the Ninth Circuit in Nos. 18853 and 18954, issued June 8, 1964, is reported at 333 F.2d 689 and is reproduced herein at Appendix A. The order of the Federal Power Commission clarifying the license in Project No. 2082, issued June 23, 1965, is reported at 33 F.P.C. 1282 and is reproduced herein at Appendix B. The order of the Federal Power Commission denying the Department's petition for rehearing, issued August 20, 1965, is as yet unreported and is reproduced herein at Appendix C. The opinion of the Court of Appeals for the Ninth Circuit in No. 20435, issued March 4, 1966, is reported at 359 F.2d 165 and is reproduced herein at Appendix D.

JURISDICTION

The decision of the court of appeals in No. 20435 was entered March 9, 1966. The order of the court of appeals

---

1. The record references are to the record heretofore certified to this Court by the Clerk of the Court of Appeals for the Ninth Circuit in No. 20435 in that court, which are also designated as the record in No. 506, October Term, 1966 in this Court. That record was certified by the Clerk of the Ninth Circuit in three volumes; Vols. 1 and 2 consist of the printed record before the Ninth Circuit in Nos. 18853 and 18954 and are numbered serially as pages 1 through 466. Volume 3 of the record certified by the Clerk consists of the record before the court of appeals in No. 20435 and is numbered from pages 1 through 163.

Nine copies of Vols. 1 and 2 have been filed in No. 506. Accordingly, we reproduce in the Appendix only those decisions not printed in Vols. 1 and 2.

denying the petition for rehearing filed by the Department was entered on June 8, 1966. On August 31, 1966, Mr. Justice Fortas entered an order extending Pacific's time to file this cross-petition to and including September 21, 1966. Jurisdiction of this Court rests on Section 1254(1) Title 28 U.S.C. and upon Section 313(b) of the Federal Power Act, Section 825*l*(b) Title 16 U.S.C.

QUESTIONS PRESENTED

1. May the Federal Power Commission order Pacific, a federal power licensee, to convey a fish hatchery to the State of California and to reimburse the State for the cost of operating and maintaining the hatchery without any evidence, findings or reasons to support such order?

2. May the Federal Power Commission without findings or reasons abrogate a contract between Pacific and the State of California by virtue of which the State would operate and maintain, without reimbursement from Pacific, certain fishery facilities constructed by Pacific?

STATUTES INVOLVED

The essential statutory provision involved in this proceeding is Section 10(a) of the Federal Power Act, 41 Stat. 1068 (1920), as amended, 16 U.S.C. § 803(a), which provides as follows:

> "All licenses issued under [the Federal Power Act] shall be on the following conditions:
>
> "(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other bene-

ficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

STATEMENT

Pacific[2] owns a series of hydroelectric plants on the Klamath River in Oregon and California, all covered by one license, issued by Respondent Commission pursuant to Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), and collectively designated Project No. 2082.

At the time the two lower-most of these plants, called the Copco plants, were constructed in the early Twenties, Pacific built fish hatchery and egg collecting facilities which were conveyed to the Department[2] for it to operate and maintain pursuant to state law without further reimbursement from Pacific. It was regarded by the Department that Pacific's obligation for preservation of the fishery had been discharged. (R. Vol. 1, pp. 161-62, Vol. 2, p. 292.) Nevertheless, some 20 years later complaints were made that fluctuations in the Klamath River below the plants arising from normal operation of the Copco plants had an adverse effect upon fish runs in the river. Thereafter, the Department filed an action in the California Superior Court in and for the County of Siskiyou to abate the fluctuation as an alleged nuisance. (R. Vol. 1, pp. 164-65.)

By written agreement dated July 27, 1959, Pacific and the Department agreed to settle their differences. (R. Vol.

---

2. Until 1961, the hydroelectric developments here involved were owned by The California Oregon Power Company, often referred to in the record as "Copco". The term "Pacific" embraces the present Licensee (which became the owner of the project by Commission approved merger in 1961) and its predecessors. The term "Department" includes the Department of Fish and Game of the State of California and its various predecessor agencies.

2, pp. 260-67.) In return for the Department's dismissal of the state court suit and its agreement never to make further claims against Pacific for "damages or any other relief" arising from the alleged fluctuation nuisance (R. 265), Pacific agreed to construct a re-regulating dam some six miles below the Copco plants on the Klamath at Iron Gate and to construct egg collecting facilities there for the Department to operate in connection with its fish hatchery operations throughout the state (R. Vol. 2, pp. 262-63). The agreement preserved the right of the Department later to claim that a fish hatchery was also required (R. Vol. 2, p. 265). While it was contemplated by the parties that any fishery facilities constructed at Iron Gate would be operated by the Department, nothing in the agreement required Pacific to reimburse the Department for the cost of operation and maintenance of any facilities. (R. Vol. 1, pp. 74-76, Vol. 2, p. 263.)

The Commission determined that the project was best adapted to development of the waterway, the licenses were issued (R. Vol. 2, pp. 331-57), the dam and egg-collecting facilities were constructed at a cost to Pacific of in excess of $8,000,000, and the conditions for anadromous fish in the river were significantly improved. In addition, the dam has created a reservoir of some 1,200 acres available to the public for swimming, boating and lake fishing, thereby vastly improving the recreational facilities of the entire upper Klamath River area. (R. Vol. 1, pp. 168-71.)

On August 21, 1961, the Department filed a petition with the Commission requesting, in effect, that Pacific be required to construct a fish hatchery at the cost of an additional million dollars, convey the hatchery to the Department, and reimburse the Department for the estimated $100,000 annual cost of operating and maintaining the fish hatchery at Iron Gate as well as the egg collecting facility

which was then nearing completion and which the Department in fact commenced to operate in February 1962. (R. Vol. 2, pp. 366-69.)

By his initial decision entered November 14, 1962, the Examiner held that Pacific should be required to construct a hatchery and to convey it to the Department on the condition that the Department agree to operate and maintain the hatchery without reimbursement from Pacific (R. Vol. 2, pp. 381-93).

By its Opinion No. 381 (R. Vol. 2, pp. 397-412), as amended on rehearing by Opinion No. 381-A (R. Vol. 2, pp. 436-59), the Commission ordered Pacific to construct a fish hatchery, convey it to the Department,[3] and to reimburse the Department for 80% of the cost of operating and maintaining the hatchery as well as the egg collecting facility already being operated by the Department. The Commission made no findings, and there was no evidence, that operation of the hatchery by the Department, rather than by Pacific, was required in the interests of preserving the fishery or that reimbursement of the Department by Pacific was required to secure operation of the hatchery or of the egg collecting facility.

Both Pacific and the Department filed petitions to review the order of the Commission in the Court of Appeals for the Ninth Circuit, pursuant to Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b). On June 8, 1964, the court entered its opinion. The court affirmed the Commission's order requiring Pacific to construct a fish hatchery and reimburse the Department for 80% of the cost of operating and maintaining it, but held that the Commission's order requiring Pacific to reimburse the Department for 80% of the cost of operating and maintaining an egg col-

3. The Commission did not itself expressly order conveyance of the fish hatchery; however, as the court of appeals noted, this requirement was implicit in the order (Appendix, p. 9).

lecting facility was in contravention of Pacific's rights under its contract with the Department. Accordingly, the court remanded to the Commission (1) for it to clarify its order by indicating whether reimbursement for 80% of the cost of operation and maintenance was intended to mean 80% of the cost of operating at full capacity or 80% of the cost of actual operations, and (2) for it to determine whether there was any evidence in the record which would justify the Commission's setting aside Pacific's rights acquired by contract with the Department.

Thereafter, the Department filed a petition for writ of certiorari in which it contended that the Commission was required by law to impose all operation and maintenance costs upon Pacific; and Pacific filed a conditional cross-petition for writ of certiorari.[4] Both petitions were denied by this Court on January 18, 1965, 379 U.S. 969.

On June 23, 1965, the Commission entered its order clarifying the 80% reimbursement language in the license, and on August 20, 1965, in denying a petition for rehearing and motion for further relief filed by the Department, the Commission stated that there was no further evidence in the record which would justify setting aside the Department's contractual obligation to operate the egg collecting facility without reimbursment from Pacific.

In its further petition to review filed with the Court of Appeals for the Ninth Circuit on October 15, 1965, the Department contended, first, that it had been denied a full

4. The Department contends that Pacific opposed its earlier petition for writ of certiorari on the ground of ripeness for review (Department's petition in No. 506, p. 12). Pacific's position was, rather, that the full extent of its own obligation would not be determined until after decision by the Commission on remand. The question of the power of the Commission to require that Pacific pay less than all operating and maintenance costs had been finally decided by the court of appeals and could not have been disturbed by the Commission on remand. This was the question which the Department tendered to this Court and has now tendered for a second time.

hearing in the remand proceedings before the Commission, and second, that the court of appeals should reverse its earlier decision in all respects decided contrary to the Department. The court affirmed the Commission's orders entered on remand and dismissed the petition to review to the extent that it related to matters once decided by the court.

On August 31, 1966, the Department filed its petition for writ of certiorari herein in which it once again seeks to relitigate the questions decided by the court of appeals more than two years ago in its opinion of June 8, 1964 and presented to this Court in its petition for writ of certiorari which was denied nearly two years ago.[5]

REASONS FOR GRANTING THE CROSS-WRIT

Pacific believes that this Court will have no interest in considering matters which have already been presented to it and assumes that the Department's petition for writ of certiorari will be denied. However, if the case were to be considered by this Court at all, it should be for the purpose of resolving the questions presented by this cross-petition, both of which are of greater moment than any presented by the Department.

The Commission's Order Is Unsupported by Findings, Reasons or Evidence.

The Commission's order requiring Pacific to convey its hatchery to the Department and reimburse the Department for a portion of its cost incurred in operating the fish

---

5. See note 4, *supra*. Pacific believes that the question of the Commission's power to require that Pacific pay less than all the cost of operating and maintaining the hatchery was finally decided by the court of appeals in its opinion of June 8, 1964, and is now *res judicata*. *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336-337 (1958); *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940).

hatchery is not supported by any reason for doing so or by finding that such is required to secure operation of the hatchery.

Pursuant to its conceded powers under Section 10(a), the Commission ordered Pacific to build a hatchery, and in the normal case it would look to Pacific for the operation and maintenance of that hatchery. But in this case the Department requested that the hatchery be given to it to operate and maintain as part of its state wide fish hatchery network. In response to that request, the Commission ordered the hatchery transferred to the Department without any finding or evidence to support the need for doing so.

Having thus taken Pacific's hatchery without its consent, the Commission ordered Pacific to pay money to the Department in perpetuity to support operation and maintenance of the hatchery. Again, there was no finding that such was required to secure operation of the hatchery or evidence to support such finding.

We submit that this action taken without findings or evidence took the Commission far beyond the realm of preserving the natural resource and was a naked intrusion into the relationships existing between Pacific and the State of California.[6] It has done so without any finding that any

---

6. In the normal course of events, Pacific would have operated the hatchery. However, if the Department had requested Pacific to transfer its hatchery to the State, Pacific would have done so, but on condition that the Department agree to operate and maintain the hatchery. By accepting the hatchery, the Department would have become fully obligated to operate and maintain it at state expense.

California's own policy of sharing the cost of preserving its fishery with the developers of hydroelectric facilities is expressed in Section 5938 of the California Fish and Game Code. It is there provided that any fish hatchery constructed by a dam owner at the direction of the California Commission of Fish and Game shall be operated by the Department "without further expense to the owner of the dam", except in minor respects not here pertinent.

policy under the Act so requires. So to do, clearly transcends the Commission's power under the Act.

In the face of this complete lack of findings or reasons to support the Commission's order, the court fashioned a new doctrine under which no findings are required.[7] According to the court, so long as the "objective that the Commission seeks here is one that Congress has authorized it to seek", the choice of means rests entirely with the Commission and need not be supported by findings (Appendix, p. 10). This erroneous doctrine should be rejected by this Court and its application to Pacific herein reversed for a number of reasons.

1. In the name of this erroneous doctrine, a substantial portion of Pacific's property has been confiscated in contravention of Pacific's rights guaranteed by the Fifth Amendment.

2. The doctrine announced by the court below has much greater potentialities than its application to Pacific in this case. Under this doctrine, any of Pacific's property which might in the future be constructed pursuant to Commission license could be similarly confiscated by the Commission, and so could such property of any other federal power licensee. The Commission need only conclude that the object sought by the Commission, to wit, the operation of such property, is authorized by Congress. Upon such findings the Commission is thus free to order conveyance of such property to the State and reimbursement to the State in perpetuity for the cost of operating such property, and it may do

---

7. The Court also suggested that the Commission might have found that the State's "competence" and "willingness" to operate a hatchery were such that development of the natural resources required operation by the Commission, rather than by Pacific. Since the Commission had made no such findings, it is obvious that the Court could not itself supply such findings. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962); *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 87-8 (1943).

so without any finding that the means adopted are required to achieve the objectives of the Federal Power Act.

3. The court's decision is contrary to numerous decisions of this Court. This Court has repeatedly held that means chosen by administrative agencies to achieve lawful statutory objectives must be fully justified by findings and reasons. *Secretary of Agriculture v. United States,* 350 U.S. 162, 167 (1956); *S.E.C. v. Chenery Corp.,* 318 U.S. 80, 87-8 (1943); *Morgan v. United States,* 298 U.S. 468, 480 (1936). Ironically, the court below in this very case quoted from one such decision, *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 167 (1962), as follows:

> "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. See *Siegel Co. v. Federal Trade Comm'n,* 327 U.S. 608, 613-614. Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster, which rules with no practical limits on its discretion.' *New York v. United States,* 342 U.S. 882, 884 (dissenting opinion). 'Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.' *Federal Communications Comm'n v. RCA Communications, Inc.,* 346 U.S. 86, 90."

4. The court's decision is contrary to its own decision in this very case with respect to the egg collecting facility. Having found that the Department is obligated by contract to operate and maintain the *egg collecting facility,* the court held that the Commission might not "now transfer the burden to Pacific" unless "it found upon sufficient evidence

that there are sound reasons to do so" (R. 518). At the same time, the court held that the Commission might require Pacific to reimburse the State for its cost of operation and maintenance of the *hatchery* without any finding or evidence that there are sound reasons for doing so. The court thus condoned in the one case what it condemned as administrative arbitrariness in the other. In both cases the end sought by the Commission is lawful, but in neither case are the means reasonable, we submit, unless supported by administrative findings and reasons.

The Court Has Abridged Pacific's Rights Acquired by Its Settlement Agreement with the Department.

The court has misconstrued the settlement agreement between Pacific and the Department which relieves Pacific from all claims and demands and thus from any obligation to reimburse the Department for operation and maintenance costs. The court held instead that the agreement does not relieve Pacific from the obligation to pay for the operation and maintenance cost of the *hatchery*. According to the court, since the agreement does not require "that the Department, rather than Pacific, pay for operation and maintenance" (Appendix, p. 12), the Department is free to claim perpetual reimbursement from Pacific. This makes a mockery of the Department's release of "all claims and demands" (R. 265). We had heretofore thought such language meant that nothing more could be claimed, other than that specifically promised by Pacific in the agreement. According to the court, the language means just the opposite: anything may be claimed which the Department did not by specific enumeration promise not to claim. This is a clearly erroneous interpretation.

We submit that neither the court of appeals nor the Commission is free to set aside Pacific's rights acquired by

contract. So to do is an abridgment of Pacific's rights guaranteed by the Due Process Clause of the Fifth Amendment. *Lynch v. Griswold*, 292 U.S. 571, 599 (1934).

CONCLUSION

For the reasons hereinabove stated, this cross-petition should be granted if the Department's petition in No. 506 be granted.

Respectfully submitted,

GREGORY A. HARRISON
MALCOLM T. DUNGAN
JOHN E. SPARKS
BROBECK, PHLEGER & HARRISON
Attorneys for Petitioner Pacific Power & Light Company

September 16, 1966

(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

Pacific Power & Light Company, Department of Fish and Game of the State of California, *Petitioners,* vs. Federal Power Commission, *Respondent.*	Nos. 18,853 and 18,954

[June 8, 1964]

On Petitions to Review an Order of the
Federal Power Commission

OPINION

Before: POPE, MERRILL and DUNIWAY, Circuit Judges

DUNIWAY, Circuit Judge:

These are petitions, consolidated for hearing and determination, to review a decision of the Federal Power Commission. The order in question relates to the Iron Gate Dam on the Klamath River in Northern California, a facility constructed by petitioner Pacific Power & Light Company (Pacific) under a Commission license. Pacific attacks the portion of the order that requires it to construct, at its expense, a fish hatchery, and to reimburse the Department of Fish and Game of the State of California (Department) for 80 percent of the cost of operating the hatchery and of operating fish egg taking facilities already constructed.

The Department also attacks the order, urging that Pacific should be required to pay 100 percent of the cost of the operation of these facilities, with one exception.[1]

The Klamath River, which rises in Southern Oregon and flows into and across California to the Pacific Ocean, has long been a famous fishing stream, supporting large numbers of anadromous fish: king salmon, silver salmon and steelhead trout. Pacific's predecessor, the California Oregon Power Company (Copco), constructed five hydroelectric plants on the river and its tributaries, between 1908 and 1925. None was licensed by the Commission; three were constructed before the enactment of the Federal Water Power Act on June 10, 1920.

Two of the plants, Copco No. 1, built in 1918, and Copco No. 2, built in 1925, are located close together on the river and about 100 miles from the sea. Their construction cut off access to spawning areas above them, and Copco and the State of California therefore agreed that Copco should build a fish hatchery at Fall Creek, just below Copco No. 2, and an egg taking station. The hatchery was conveyed to the state, which operated it at its own expense, until 1948, when it was abandoned. Thereafter, eggs taken at the station were transported by the state to its Mt. Shasta hatchery.

---

1. The Department voluntarily consents to bear operation and maintenance costs of Iron Gate Fishery facilities that may be incurred for all king salmon egg taking at Iron Gate over 15,800,000 annually, and 19% of the quantity up to that figure. It asserts that it has not agreed to bear any costs with respect to species other than king salmon, or 81% of the king salmon eggs up to 15,800,000 annually.

The Department takes this distinction based upon its historical assumption of operation and maintenance costs of the now abandoned Fall Creek facilities and facilities substituted since its abandonment. However, this distinction becomes irrelevant in view of the conclusions we reach, *infra*.

Copco No. 1 and No. 2 have been operated as peak load facilities. Water was released downstream only when it was desired, because of demands on the Copco system, to add to their power output. This has resulted in sudden and extreme fluctuations in the flow of the river, which in turn, has been detrimental to the fishery and hazardous to human life. While Copco claimed that its operation in this manner had continued so long that it had a prescriptive right to continue it, the state took a contrary position, and sought to prevent the operation as a public nuisance. In 1950 it filed suit for that purpose. (See *California Oregon Power Co. v. Superior Court,* 1955, 45 Cal.2d 858, 291 P.2d 455).

In 1951, Copco applied to the Commission for a license to construct another facility, called Big Bend No. 2. The Commission then issued an order requiring it to show cause why all of the existing facilities should not be brought under license. (See *California Oregon Power Co.,* 10 F.P.C. 1561) In 1954, the Commission held that all of the facilities were within its jurisdiction. (13 F.P.C., 1; 15 F.P.C. 14; *California Oregon Power Co. v. F.P.C.,* D.C. Cir. 1956, 239 F.2d 426) The 1954 order left open the question whether a license should require the installation of re-regulating facilities at Iron Gate.

In 1957, Copco asked for a license, Project No. 2082, for the existing facilities, and also for an amendment of the license to authorize the Iron Gate development, for two stated purposes, production of power and regulation of the flow of the river. Thereafter, in 1959, Copco and the state entered into an agreement which refers to the state's pending lawsuit and Copco's pending application for a license for Iron Gate. It recites that Iron Gate will regulate the flow of the river in the manner desired by the state, and that the desire of the parties is to facilitate the issuance

of the license. Copco agrees to proceed with the development as soon as licensed, and to release water from it in a manner specified. The agreement, paragraph 3, also provides: "Copco shall construct permanent fish trapping and egg collecting facilities at or near and downstream from the Iron Gate development, . . . and title thereto, . . . shall, upon completion of the facilities, be conveyed by Copco to the State;".

Copco received from the state a dismissal, with prejudice, of its lawsuit, and a release. It agreed, pending construction of Iron Gate, to "manually operate" Copco No. 1 and No. 2 so as to limit downstream fluctuations. The release is: ". . . from any and all claims, demands, actions and causes of action, for any and all legal and equitable relief arising at any time in the past, and for such reasonable future time as may be necessary for construction of the Iron Gate development referred to in said agreement by reason of alleged conduct of Copco of the kind described in the complaint in an action in the Superior Court of the State of California, in and for the County of Siskiyou, No. 13995." The agreement states, in reference to the release and dismissal: "The parties hereto understand and agree that the effect of said dismissal with prejudice and said release will be that no claim will ever be made against Copco in the future for damages or any other relief arising out of any act or omission of Copco, up to the date of this agreement so long hereafter as Copco shall perform its obligations under this agreement, of the kind embraced within the complaint in said state court suit; but that the prosecution of any action hereafter brought, claiming relief by reason of alleged wrongful conduct of Copco occurring after the date of this agreement, shall not be prejudiced thereby." It also provides: "The State, the Department and the [California Fish and Game] Commission shall forthwith cause to be with-

drawn and dismissed all protests and interventions with respect to the pending applications of Copco before the Federal Power Commission in Project No. 2082, and before the State Water Rights Board in Application No. 17,527; provided, that the right is reserved to all parties hereto to be heard in any future proceedings in regard to fishery facilities, other than the fish trapping, and egg collecting facilities referred to in paragraph 3 thereof." It does not state at whose expense the fish trapping and egg collecting facilities are to be operated. Pacific asserts that conveyance of title to the state means that the state is to operate them at its own expense, particularly because the reservation of the rights to be heard in future proceedings in regard to fishery facilities expressly excepts the fish trapping and egg collecting facilities.

Pursuant to the agreement, the state, the Department and the California Fish and Game Commission withdrew their protests and interventions in the Commission's Project No. 2082, and the Commission issued its license for Iron Gate in January, 1960. (23 F.P.C. 59; 25 F.P.C. 579). The order amends the license for Project No. 2082 to include the existing facilities, and to authorize Iron Gate, all as part of a single project. Article 30 contains the following reservations: "The Commission reserves the right to determine at a later date after notice and opportunity for hearing, the following matters . . . (b) Whether the Licensee for Project No. 2082 shall construct, operate and maintain a fish hatchery and appurtenant facilities.

Article 42 requires construction of the agreed-upon fish trapping and egg collecting facilities. It is silent on the subject of their operation. Article 43, on the other hand, requires Copco to construct, maintain and operate fish ladders, fish traps, or other fish handling facilities or fish protective devices.

An amendment of March 27, 1961 adds Articles 49 and 50:

"Article 49. The Licensee shall construct, maintain, and operate or shall arrange for the construction, maintenance, and operation of artificial propagation facilities and such other permanent fish facilities and protective devices including, but not limited to, fish-hauling trucks, fish screens or ladders, and comply with such reasonable modifications in project structures and operation in the interest of fish life as may be prescribed hereafter by the Commission upon the recommendation of the Secretary of the Interior and the California Department of Fish and Game, after notice and opportunity for hearing.

"Article 50. The Licensee shall construct, concurrently with the construction of Iron Gate Dam, and thereafter operate and maintain permanent fish trapping, collecting, holding, and spawn-taking facilities and appurtenances at or near and downstream from Iron Gate Dam as may be prescribed hereafter by the Commission upon the recommendation of the Secretary of the Interior and the California Department of Fish and Game, after notice and opportunity for hearing."

Articles 42 and 43 were eliminated. The license, as so amended, was accepted by Copco.

In August, 1961, the Department petitioned, in Project No. 2082, pursuant to Article 49, for an order requiring Pacific to construct, operate, and maintain a hatchery adjacent to the egg collecting station. The petition does not ask that Pacific be required to pay the cost of operating the egg collecting station. Pacific denied that a hatchery was necessary or appropriate, and the matter was heard on these pleadings. Pacific and the Department stipulated as to the size and type of hatchery that would be built, if the Commission should so order, but reserving Pacific's claims that a hatchery was not required and that, if required,

Pacific should not pay for it or for its operation. The power of the Commission to require the construction and operation of fishery facilities, including a fish hatchery, rests on section 10(a) of the Federal Power Act, 16 U.S.C. § 803(a), which provides that all licenses issued by the Commission shall contain conditions:

> "That *the project* * * * shall be such as in the judgment of the Commission will be best *adapted to a comprehensive plan for improving or developing a waterway or waterways* for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and *for other beneficial uses, including recreational purposes;* * * *" (Emphasis added)

The petitioners are agreed that the Commission is empowered by this subsection to require the construction and maintenance of a fish hatchery. The basic questions, then, are whether this is an appropriate case for the exercise of that power, and if so, whether the power has been properly exercised. Pacific also concedes that the question of whether a hatchery should be built was reserved, both in its agreement with the state and in the Commission's prior orders, and was properly before the Commission upon the Department's August, 1961 petition. Its contention is that the evidence does not sustain the determination that a hatchery was needed. We do not agree.

The evidence shows that one of the reasons for constructing the Iron Gate Dam was to regulate the flow of the stream, so as to eliminate the extreme fluctuations caused by the method of operating Copco Nos. 1 and 2. It was Copco that chose to operate them that way. It could have abated the fluctuations by operating them in a different manner. It preferred the Iron Gate Dam because this would assure the continued operation of Copco Nos. 1 and 2 as

peak load facilities, would create another source of power at Iron Gate Dam itself, and would eliminate the fluctuations as the state was seeking to require, both in its lawsuit and before the Commission. The fact that the state, which had been seeking to abate what it claimed to be the nuisance created by Pacific's method of operating its two facilities, decided to accept this method of abatement, does not make the choice that of the state rather than that of Pacific. At most it makes it the choice of both. When parties settle a controversy, the settlement is ordinarily not forced by one upon the other—usually it is a result somewhere between the desires of either.

The way in which these objectives were accomplished was by the building of a dam at Iron Gate, some 8 miles below Copco No. 2. This created a reservoir area some 8 miles long, into which flows the irregular discharges from the two Copco facilities, and in which they are held. The power plant and dam at Iron Gate are then so operated as to maintain a reasonably continuous discharge of water below Iron Gate. This does eliminate the fluctuations below Iron Gate, and does improve the fishery below Iron Gate.

There is, however, another result. The new reservoir, above Iron Gate, submerges some 16 miles (about 8 on the Klamath; about 8 on its tributaries) of the better fishing and spawning grounds on the river. It covers them with comparatively still water, and renders them unfit for spawning, and less desirable as habitat. The evidence supports, though it may not require, a finding that most fish headed upstream and reaching the barrier of Iron Gate Dam will not turn back downstream to spawn, and that a substantial percentage (perhaps over 50%) of the fish moving upstream will be so affected. The fish could not testify. The Commission had to rely upon studies by, and the opinion testimony of, expert biologists. In the nature of things, precision in

prediction was quite impossible. But as we read the record, we think that it fairly supports the Commission's conclusions that "without a hatchery there can be no assurance that the fishery resource will be preserved and maintained at a level approximately equal to that which existed prior to construction of the Iron Gate Development" and that "[s]ince Licensee has created the situation which necessitates the fish hatchery, it is no more than reasonable to require that it pay the cost of construction thereof."

We have no doubt that the Commission could require Pacific to construct the hatchery at its own expense. Pacific's operations, as a unit, substantially interfere with the natural ecology of the river and deleteriously affect one of its most valuable recreational features. It is quite proper that, as a condition to its having the privilege of so doing, Pacific should be required to pay for facilities that will, at least in part, prevent the impairment of the principal recreational feature of the stream.

The Commission's orders do not directly require that the hatchery be conveyed to the state, as the contract between Pacific (Copco) and the state requires that the egg taking facilities be conveyed. But this result is certainly implicit in the order, else why the requirement that Pacific reimburse the Department for 80 percent of the cost of its operation and maintenance? At oral argument, counsel for Pacific stated that it would prefer to own and operate the hatchery itself. This, however, seems to be an afterthought. We cannot find in the record any indication that it seriously urged this contention before the Commission. There, its position has been (a) that no hatchery is needed, (b) that if one is needed, Pacific should not be required either to build it or pay for it, and (c) that in any event it should not be required to pay for maintenance and operation. It

does not now urge that the state is not able or willing to operate the hatchery properly.

Assuming that the contention is available to Pacific, we cannot say that it is improper for the Commission to require conveyance of the hatchery to the state. The state and federal governments are not such separate entities, either legally or in fact, that one cannot call upon the other to help to achieve, in the public interest, a result that they both desire. The objective that the Commission seeks here is one that Congress has authorized it to seek. The choice of means, so long as they are reasonably adapted to achieve the authorized end, is not for Pacific, but for the Commission. There is no doubt, upon this record, as to the competence of the state to operate the hatchery, or its willingness to do so. If there be evidence in the record that Pacific is equally able and willing, it has not been called to our attention.

There remain the questions of the expense of maintenance and operation (1) of the hatchery and (2) of the egg taking facilities. As to the hatchery, we think that what we have already said disposes of the question. If the Commission could have required Pacific to build and itself to maintain and operate, and if, as we have held, it could require conveyance of the hatchery to the state, it can also require that the state be reimbursed for the expense of maintenance and operation. Unless the hatchery is maintained and operated, its construction means nothing, and the desired end, preservation of the fishery, will not be achieved.

Pacific's reply is, first that the Commission is meddling in matters that are beyond the scope of the Federal Power Act, and is acting in contravention of state laws. It says that, if no funds were provided by it, the Department would still be required by state law to operate the hatchery at its expense, and that therefore the Commission's order improp-

erly interferes with the fiscal affairs of the state, and unlawfully imposes upon Pacific a burden that, under state law, Pacific is entitled to have the state bear. It says, second, that its settlement agreement with the state gives it a contract right to have the state maintain and operate the hatchery.

In support of its first argument, Pacific cites Section 5938 of the California Fish and Game Code. That section provides:

> "Whenever in the opinion of the [California Fish and Game] commission it is impractical, because of the height of any dam, or other conditions, to construct a fishway over or around the dam, *the* [*California Fish and Game*] *commission may,* in lieu of the fishway, *order the owner of the dam completely to equip,* within a specified time, on a site to be selected by the department, *a hatchery,* together with dwellings for help, traps for the taking of fish, and all other equipment necessary to operate a hatchery station, according to plans and specifications furnished by the department. *After such hatchery has been constructed,* the department shall operate *it* without further expense to the owner of the dam except as provided in sections 5940 and 5941." (Emphasis and bracketed words added.)

It was first enacted in 1917 (Cal. Stats. 1917, ch. 749, § 1), before the Federal Water Power Act, and on its face deals only with hatcheries ordered constructed by the state. It does not purport to deal with federally licensed projects. Here, it is the Commission, not the state, that ordered the hatchery constructed. The Department's request that the Commission do so does not make the order the state's order. Indeed, we think it doubtful that the state could have ordered this federal licensee to construct a hatchery at this federally-licensed facility. We think there is nothing in Pacific's first contention. Nor is there anything in Pacific's argument that the Department has no authority to receive

or use the funds required to be paid to it. We doubt if Pacific has any standing to raise the question. Section 13,011 of the California Fish and Game Code does not support Pacific's arguments.

The short answer to Pacific's second contention is that there is nothing in the agreement with the Department, or the release, that requires that the Department, rather than Pacific, pay for the operation or maintenance of the hatchery. On the other hand, Article 49 of Pacific's license does require Pacific to "construct, maintain and operate, or . . . arrange for the construction, maintenance and operation of artificial propagation facilities . . . as may be prescribed hereafter by the Commission. . . ."

The egg taking facilities present a different question. They were provided for in Pacific's agreement with the Department, had been constructed and conveyed to the Department, and were being operated by the Department, when the order under review was made. We assume that Article 50 reserves the question as to who shall pay for operation and maintenance, as the Department claims.[2] But we are of the opinion that the contract, although it does not specifically refer to maintenance and operation, contemplates maintenance and operation by the Department, and that the reservation in the contract relating to fishery facilities, which specifically excepts these facilities from its terms, does not reserve to the Department the right to demand that maintenance and operation be paid for by

2. We are not, however, convinced that it does. Article 50 refers to facilities of this kind that "may be prescribed hereafter . . . after notice and hearing." Hereafter must mean after March 27, 1961, when Article 50 was added to the license. The Commission had previously, in Article 42, of January 13, 1960, ordered Pacific to construct the agreed facilities. They were completed and tendered to the state by February of 1962. How, then, can Article 50 refer to them? On its face, it appears to refer to possible different or additional facilities.

Pacific. The Department made a post hoc attempt to keep the question open by accepting the conveyance of the facilities, as agreed, but seeking to reserve the question unilaterally. This, however, cannot change the effect of the agreement, although the Commission seems to rely rather heavily upon it. We do not think that Article 50 is a valid contrary determination by the Commission. Nor does the original reservation in Article 30 of the license for Iron Gate reserve this question. The Department's petition did not ask for this relief specifically.

It may well be that none of these facts, as a matter of law, prevents the Commission from requiring Pacific to pay for the maintenance and operation of these facilities.[3] But the existence of power in the Commission does not dispose of the problem. The state arrived at a settlement with Pacific, under which these facilities were constructed and conveyed by Pacific to it. The Commission, to that extent, saw to it that the state got this benefit of its bargain. The state reserved no right to make further demands in this connection. We hold that it impliedly agreed to pay for maintenance and operation. This, together with the Commission's orders relating to the hatchery, appears to us, absent other facts, to assure the desired preservation of the fishery. The Commission gives us no reason in public policy why the Commission should now transfer the burden to Pacific and relieve the state from its bargain. We think that it would be justified in so doing only if it found upon sufficient evidence that there are sound reasons to do so. It made no such finding or determination. So far as its find-

3. The Commission says that it is not bound by any agreement between Pacific and the Department, citing *F.P.C. v. Oregon*, 349 U.S. 435; *First Iowa Hydro-Electric Coop. v. F.P.C.*, 328 U.S. 152, and other cases. This, however, does not mean that the Commission can arbitrarily disregard the contract.

ings and opinion revealed, it based its decision entirely upon what we hold to be its erroneous legal conclusions, either (a) that the state had not agreed to pay the cost of operation and maintenance, or (b) that the state could unilaterally relieve itself of its obligations, or (c) that Article 50 had the effect of relieving the state of its obligations.

The Commission now asserts in its brief that it is not bound by the contract, assuming that it means what Pacific says that it does and what we hold that it does. We quite agree that this is not a private lawsuit between Pacific and the Department. We also agree that the Commission is not "bound" by the contract. We do not, however, think that this alone is a reason for disregarding the contract.[4] As the Supreme Court has said in *Burlington Truck Lines, Inc. v. United States,* 1962, 371 U.S. 156, 167;

> "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. See *Siegel Co. v. Federal Trade Comm'n,* 327 U.S. 608, 613-614. Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster, which rules with no practical limits on its discretion.' *New York v. United States,* 342 U.S. 882, 884 (dissenting opinion). 'Congress did not purport to transfer its legislative power to the unbounded discre-

4. The Federal Power Act, § 313(b) (16 U.S.C. § 8251(b)) declares that this court, on review of an order of the Commission, has jurisdiction "to affirm, modify or set aside such order [of the Commission] in whole or in part." The Administrative Procedure Act, § 10(e) (5 U.S.C. § 1009(e)) directs that this court shall "hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

tion of the regulatory body.' *Federal Communications Comm'n v. RCA Communications, Inc.*, 346 U.S. 86, 90."

The Commission does not act in a vacuum, and we think it just as much bound to take into account a contract of this kind, which, if carried out, would assist in accomplishing the result that the Commission desires, as it is to take into account the topography of the Klamath River Basin and the biological functioning of anadromous fish. Surely, it would be arbitrary if the Commission had concluded, in the face of the evidence, that the fish would spawn successfully in the reservoir formed by the Iron Gate Dam, when all of the evidence is that they would not. So here we think it arbitrary for the Commission to disregard the contract for no apparent reason. It has not found, and it makes no attempt to point to any evidence that would support a finding of reasons to disregard the contract and thus relieve the state of its bargain.

There remains the Department's contention that the Commission could not require that it pay 20 percent of the cost of maintenance and operation of the hatchery. The Commission did not so order. It merely ordered that Pacific pay 80 percent. The Department asserts that section 10(a) of the Act, quoted *supra*, requires that the Commission impose the entire cost upon Pacific. The section certainly does not do so expressly. It merely requires conditions in the license that, "in the judgment of the Commission," will be best adapted, *inter alia*, "for other beneficial uses, including recreational purposes." We think that this gives the Commission wide latitude, and that its judgment should not be disturbed unless exercised in an arbitrary manner.

Here the Commission determined that "[t]he evidence in the record *suggests* that the regulation of the flow of the Klamath River by the Iron Gate Dam combined with the

construction and operation of the hatchery will result in a greater fish population than if Iron Gate had not been built. This would stem from the reduction or elimination of destruction of natural fluctuation and river levels which will follow from the construction of Iron Gate Dam and its operation in accordance with the year-round minimum releases required by Article 52 of the license. To impose on the Licensee the full costs of building and operating the hatchery would not merely restore the status quo, but would actually require Licensee to pay for enhancing the fish production as compared with pre-Iron Gate conditions. Apportioning 20 percent of the operating costs to the Department will *more nearly* result in restoring the status quo." (Our emphasis)

The Department attacks this statement as inconsistent with the formal findings that the hatchery is needed to compensate for the loss of spawning grounds above Iron Gate, and is necessary to sustain the fishery at a level *"approximately equal"* to that which existed before the construction of Iron Gate. In this, the Department is perhaps technically correct. We do not think, however, that the matter should be treated with such iron rigidity. As we have pointed out, the Commission was here dealing with predictions. The evidence does indeed "suggest" what the Commission says it does. Even the finding on which the Department relies deals only with conditions "approximately equal" to pre-Iron Gate conditions. We do not think that the Commission's conclusion is unreasonable. We need not consider the other bases for its order that are stated in the Commission's opinion. We neither approve nor disapprove them.

We do not think, however, that Article 50 of the license is unclear in one respect. Rather than requiring Pacific to pay the full cost of operating and maintaining the hatchery at

80 percent of capacity, it requires that it pay 80 percent of the annual cost of operation and maintenance. Thus, if the Department chose to reject the benefit of full capacity operation (a benefit that the Commission does not claim that it can order the Department to accept) and operates at 80 percent, Pacific would pay only 80 percent of 80 percent. This appears to be inconsistent with the views expressed by the Commission itself. We presume that the Commission intends that, so long as the Department operates the hatchery at at least 80 percent of capacity, Pacific should pay for the cost of operating at 80 percent of capacity, but that in no event should Pacific be required to pay more than actual operating costs.

It may be that there is evidence now in the record, or that other evidence can be produced, that would justify the decision of the Commission as to the operation and maintenance of the fish trapping and egg taking facilities. That is a question for the Commission, not for us. (*Burlington Truck Lines v. United States, supra; F.P.C. v. Idaho Power Co.*, 1952, 344 U.S. 17, 20-1)

The matter is remanded to the Commission for further proceedings, not inconsistent with this opinion, relating to the cost of operating and maintaining the fish trapping and egg taking facilities, and for such clarification of Article 50 as it may desire to make. In all other respects, the orders of the Commission are affirmed.

Appendix B

United States of America

Federal Power Commission

Before Commissioners: Joseph C. Swidler, Chairman; L. J. O'Connor, Jr., and David S. Black.

Pacific Power & Light Company Project No. 2082

ORDER CLARIFYING LICENSE AND DENYING MOTION TO EXTEND TIME FOR CONSTRUCTION OF FISH HATCHERY

(Issued June 23, 1965)

On April 28, 1965, the Pacific Power & Light Company (Pacific) filed a motion to extend the period for construction of a fish hatchery at its Iron Gate development, Project No. 2082, on the Klamath River in California.

Article 50 of the license for this project requires Pacific to pay the State of California 80 percent of the cost of operating and maintaining the fish hatchery (29 FPC 478, 486). An appeal was taken from the order issuing this license to the United States Court of Appeals for the Ninth Circuit. The court in *Pacific Power & Light Company v. F.P.C.*, 333 F2d 689, 697 (1964), said:

> We . . . think . . . that Article 50 of the license is unclear in one respect. Rather than requiring Pacific to pay the full cost of operating and maintaining the hatchery at 80 percent of capacity, it requires that it pay 80 percent of the annual cost of operation and maintenance. Thus, if the Department [of Fish and Game of the State of California (Department)] chose to reject the benefit of full capacity operation (a benefit that the Commission does not claim that it can order the Department to accept) and operates at 80 percent, Pacific would pay only 80 percent of 80 percent. This

appears to be inconsistent with the views expressed by the Commission itself. We presume that the Commission intends that, so long as the Department operates the hatchery at at least 80 percent of capacity, Pacific should pay for the cost of operating at 80 percent of capacity, but that in no event should Pacific be required to pay more than actual operating costs,

* * *

The matter is remanded to the Commission . . . for such clarification of Article 50 as it may desire to make.

Project No. 2082

Although the capacity of the hatchery is specified in Article 49 of the license (30 FPC 499, 503), Pacific contends that until the Department gives assurance that it will accept twenty percent (20%) of the cost of operation, the hatchery's capacity, and hence its design specifications, cannot be finally determined. Pacific requests that construction be postponed until this supposed uncertainty concerning the hatchery's capacity is settled.

On May 6, 1965, the Department filed opposition to Pacific's motion. The Department opposes delay of the construction on three grounds. First, it would be detrimental to anadromous fish runs in the Klamath River. Second, since the issue before the Commission relates only to reimbursement for the costs of maintenance and operation, there is no uncertainty as to the size and design of the fish hatchery, which have been stipulated to by Pacific. Third, the State of California will operate the fish hatchery at full capacity whenever the runs of anadromous fish provide the eggs for full capacity operation.

Pacific's motion to extend time for construction of the fish hatchery brings before us the question on remand to the Commission from the Ninth Circuit Court of Appeals as to the meaning of Article 50. We intend by Article 50

of the license that Pacific shall reimburse the State of California for 80 percent of the cost of actual operation and maintenance whether at full capacity or a lesser capacity. This clarification of the Article, and the Department of Fish and Game's statement of its intent to make full use of the fish hatchery, removes any reason that might have existed to review the hatchery's size and capacity. Thus, there is no need to delay construction. We therefore deny Pacific's motion.

The Commission finds:

It is appropriate and in the public interest in administering Part I of the Federal Power Act (16 U.S.C. 791-823) that Pacific Power & Light Company's motion, filed on April 28, 1965, to extend the time for construction of a fish hatchery at its Iron Gate development be denied.

The Commission orders:

The motion filed on April 28, 1965, by Pacific Power & Light Company to extend the time for construction of a fish hatchery at the Iron Gate development of Project No. 2082, hereby is denied.

By the Commission.

Joseph H. Gutride,
Secretary.

Appendix C

United States of America

Federal Power Commission

Before Commissioners: Joseph C. Swidler, Chairman; L. J. O'Connor, Jr., David S. Black, and Carl E. Bagge.

Pacific Power and Light Company Project No. 2082

ORDER DENYING PETITION FOR REHEARING

(Issued August 20, 1965)

On July 22, 1965, the California Department of Fish and Game (the Department) filed a petition "for rehearing or for any other appropriate form of relief" with respect to various Commission decisions and orders concerning fish facilities at Project No. 2082, owned by Pacific Power and Light Company (Pacific).[1] The prior proceedings with respect to the order on which rehearing is requested may be narrated briefly as follows:

On August 21, 1961, the State of California, acting by and through its Department of Fish and Game, filed a petition requesting that the Commission require the licensee to construct, operate and maintain a fish hatchery and appurtenant facilities, pursuant to Article 49 of the license for Project No. 2082 (25 FPC 579, 581). An answer to the petition was filed by the licensee on September 13, 1961. By order issued January 30, 1962, the Commission set the matter for hearing.

---

1. The licensee, Pacific Power and Light Company, filed on August 2, 1965 a motion to strike certain portions of the Department's petition for rehearing. However, since we here deny the Department's petition, we find it unnecessary to rule on Pacific's motion.

This Commission, in Opinion 381[2] and Opinion 381-A[3] required the licensee for Project No. 2082, Pacific Power and Light Company to construct a fish hatchery and certain fish trapping and egg-taking facilities which were included in Article 50 of the license as it appeared at the time of the hearing (25 FPC 579, 581). The Commission also required the licensee to reimburse the California Department of Fish and Game for 80% of the expenses incurred in the operation and maintenance of such facilities.

On appeal to the Court of Appeals for the Ninth Circuit, the Court upheld the requirement that the licensee construct the fish hatchery and the fish trapping and egg-taking facilities, and the requirement that Pacific reimburse the Department of Fish and Game for 80 per cent of the cost of operation and maintenance of the hatchery, but reversed the Commission's directive that Pacific reimburse the Department for 80 per cent of the operation and maintenance costs of the fish trapping and egg-taking facilities.[4] The Court's ground for reversal on the latter issue was a 1959 agreement between Pacific and the Department which, the Court held, contemplated operation and maintenance of the fish-trapping and egg-taking facilities by the Department, but did not reserve to the Department the right to demand payment by Pacific for operation and maintenance costs of such facilities.

In remanding the case to the Commission on the questions relating to the fish-trapping and egg-taking facilities, the Court also suggested[5] that the Commission might desire to clarify its requirement that the licensee pay 80% of the

---

2. 29 FPC 478, March 14, 1963.

3. 30 FPC 499, August 19, 1963.

4. Pacific Power and Light Company v. FPC, 333 F.2d 689 (9th Cir., 1964); *Cert. denied. 379* U.S. *969*, January 18, 1965.

5. 333 F.2d 689, 697.

operation and maintenance costs of the fish hatchery. On June 23, 1965, the Commission issued an order clarifying the license for Project No. 2082 in this respect and this is the order on which rehearing is requested by the California Department of Fish and Game.

In its petition for rehearing the Department appears primarily to contend:

1) that Pacific Power should be required by the Commission to pay the entire cost of operation and maintenance of the fish hatchery and that the Commission erred in limiting Pacific's liability to only 80 percent of such costs; and
2) that the prior agreement between the Department and Pacific cannot and does not have the effect of absolving Pacific from liability to pay for any part of the fish-trapping and egg-taking facilities.

Project No. 2082

We are of the opinion that the Department's petition must be denied.

With respect to liability to pay the operation and maintenance costs of the fish hatchery, the Department shows us no good reason why we should depart from our past decisions and orders. The Department argues that this Commission's determination that Pacific should pay only 80% of the hatchery operation and maintenance costs is without foundation in substantial evidence. However, this question was disposed of by the Court of Appeals when, after a review of the law and the evidence supporting the Commission's determination, it held that the conclusion reached by the Commission was reasonable and should not be disturbed.[6]

The Commission, subsequent to the Court's decision, clarified the license provision with respect to the percentage

6. 333 F.2d 689, 697.

of fish hatchery costs Pacific would be required to pay. The Department now contends that the license provision as clarified forces it, a state agency, to pay for 20% of the costs, and that such a requirement is unlawful. The Department made this same contention in the Ninth Circuit and that Court considered and disposed of this question also:

> There remains the Department's contention that the Commission could not require that it pay 20 percent of the cost of maintenance and operation of the hatchery. The Commission did not so order. It merely ordered that Pacific pay 80 percent.[7]

The situation remains the same. The Commission did not in its original determination require that the state pay any part of the operation and maintenance costs of the fish hatchery, and the order clarifying the license issued June 23, 1965 did not change this in any respect.

The Department's contention with respect to the costs of the fish-trapping and egg-taking facilities are equally insubstantial. The Court held that the 1959 agreement between Pacific and the Department excused Pacific from liability to pay for any part of the operation and maintenance costs of the fish-trapping and egg-taking facilities. The Department in its petition for rehearing concedes that the Ninth Circuit so held, but alleges that the Court erred. The Department then requests that the Commission somehow corrected this alleged error. In effect this is a request that the Commission review and modify the decision of the Court which reviewed the Commission's decision pursuant to Section 313(b) of the Federal Power Act. This is an undertaking to which we could not aspire even if we were so disposed.

---

7. 333 F.2d 689, 697.

Although the Ninth Circuit remanded the case to the Commission for further proceedings relating to the operation and maintenance costs of the fish-trapping and egg-taking facilities there is in actuality nothing more for the Commission to do. The Court had held that the Commission could not disregard the agreement between Pacific and the Department which the Court interpreted as freeing Pacific from any obligation to pay the operation and maintenance costs of these facilities.

The Commission finds:

The petition for rehearing filed July 22, 1965, by the State of California Department of Fish and Game presents no question of fact or legal principle which has not been considered before, or which now having been considered would warrant any change or modification of our Opinion No. 381 and 381-A and our clarifying order issued June 23, 1965.

The Commission orders:

The petition for rehearing in the matter of Project No. 2082 filed by the State of California, Department of Fish and Game on July 22, 1965, is hereby denied.

By the Commission.

(SEAL)

Joseph H. Gutride,
Secretary.

Appendix D

United States Court of Appeals
for the Ninth Circuit

DEPARTMENT OF FISH AND GAME OF THE STATE OF CALIFORNIA, *Petitioner,* vs. FEDERAL POWER COMMISSION, *Respondent.*	No. 20,435

[March 4, 1966]

On Petition to Review Orders of the
Federal Power Commission

Before: Merrill, Browning and Duniway, Circuit Judges

Duniway, Circuit Judge:

In our previous decision in this case we remanded to the Commission "for further proceedings, not inconsistent with this opinion, relating to the cost of operating and maintaining the fish trapping and egg taking facilities, and for such clarification of Article 50 as it may desire to make." (*Pacific Power & Light Co. v. FPC,* 1964, 333 F.2d 689, 697.) Certiorari was sought by the Department of Fish and Game of the State of California. This was opposed by the Commission on the ground, *inter alia,* that the case was not ripe for review, the issues raised being premature because on remand the Commission might conclude that there are sound reasons for requiring Pacific to bear some or all of the expense of operating and maintaining the fish trapping and egg taking facilities. In a conditional cross-petition for certiorari, Pacific took the same position. Certiorari was denied (379 U.S. 969) without comment.

Pacific then moved the Commission for an extension of time within which to construct the required fish hatchery. The Commission denied the motion on June 23, 1965. Its order (33 F.P.C. .....) recites that there is no reason for delay because the size of the hatchery had been agreed to and the State had assured the Commission that it will operate the hatchery at full capacity whenever runs of anadromous fish provide eggs for full capacity operation. The Commission also clarified Article 50 of the license, saying, "We intend by Article 50 of the license that Pacific shall reimburse the State of California for 80 percent of the cost of actual operation and maintenance whether at full capacity or a lesser capacity." Thus the Commission complied with the second part of our mandate.

On July 22, 1965, the Department filed its "Petition for Rehearing, or for Any Other Appropriate Form of Relief", asking relief ". . . with respect to that portion of the Commission's Decisions and Orders, dated March 14, 1963 and August 19, 1963 (Opinions Nos. 381 and 381A, 29 F.P.C. 478) relating to Article 50 thereof, and to that portion of the Order Clarifying License, etc. dated June 23, 1965, which provides" the above clarification of Article 50. The petition also states: "Since there may be some doubt as to whether a petition for rehearing is the proper remedy . . . the Department seeks in lieu thereof any other form of relief which the Commission may deem appropriate. . . ."

The petition continues:

> "The Court also remanded this matter to the Commission for further proceedings relating to the cost of operating and maintaining the fish trapping and egg collection facilities on the assumption 'that there is evidence now in the record, or that other evidence can be produced, that would justify the decision of the Commission as to the operation and maintenance of

the fish trapping and egg taking facilities' (333 Fed.2d 689, 697 (col. 2)). No further proceedings have been taken by the Commission in this respect. The Commission did not modify Article 50 in its clarifying Order of June 23, 1965. It left Article 50 intact. The Department takes this to mean that the Commission finds evidence now in the record which justifies the requirement that Pacific reimburse the Department for the major part of the cost of operating and maintaining the fish trapping and egg collecting facilities, irrespective of the Court's interpretation of the 1959 Agreement, which interpretation, parenthetically, is erroneous both in law and in fact. On the other hand, we are informed that Pacific takes the position that Article 50 needs no modification specifically deleting the assignment to it of part of the cost of operating and maintaining the fish trapping and egg collecting facilities, contending that the Court's construction of the contract automatically relieves it of that obligation irrespective of whether or not Article 50 is modified by the Commission.

"If the Commission agrees with Pacific's position then the Department seeks a rehearing by the Commission as a fact-finding tribunal on the question of the effect and interpretation of the 1959 Agreement by showing that there is evidence now in the record and that other evidence can be produced to justify the Commission in assessing the cost of operating and maintaining the fish trapping and egg taking facilities to Pacific, or prays for some other form of relief or hearing deemed by the Commission to be meet and proper."

There follow 31 numbered "Specifications of Error and Grounds for Relief." Each, in a somewhat different form, is an attack on the two orders that were reviewed in our previous decision, or on the decision itself, insofar as they relate to Article 50 of the license. None raises a new question. Nowhere does the petition state what evidence in the

record, or what other evidence that might be produced, would justify the Commission, on grounds of public policy, in disregarding the contract between the state and Pacific relating to the fish trapping and egg taking facilities.

The Commission, on August 20, 1965 (34 F.P.C. .....) denied the petition. In its opinion, the Commission refused to review the orders of March 14, 1963 and August 19, 1963. It concluded:

> "The Department's contention with respect to the costs of the fish-trapping and egg-taking facilities are equally insubstantial. The Court held that the 1959 agreement between Pacific and the Department excused Pacific from liability to pay for any part of the operation and maintenance costs of the fish-trapping and egg-taking facilities. The Department in its petition for rehearing concedes that the Ninth Circuit so held, but alleges that the Court erred. The Department then requests that the Commission somehow corrected [sic] this alleged error. In effect this is a request that the Commission review and modify the decision of the Court which reviewed the Commission's decision pursuant to Section 313(b) of the Federal Power Act. This is an undertaking to which we would not aspire even if we were so disposed.
>
> "Although the Ninth Circuit remanded the case to the Commission for further proceedings relating to the operation and maintenance costs of the fish-trapping and egg-taking facilities there is in actuality nothing more for the Commission to do. The Court had held that the Commission could not disregard the agreement between Pacific and the Department which the Court interpreted as freeing Pacific from any obligation to pay the operation and maintenance costs of these facilities."

The Department has now petitioned this court to review the orders of March 14, 1963, August 19, 1963, June 23, 1965 and August 20, 1965, as they relate to Article 50 of the

license. Every ground asserted except two relates to the orders previously reviewed by this court or to the merits of this court's decision on review. The exceptions are:

> "1. The Commission failed to follow the remand of the Court in its decision of June 8, 1964 (333 F.2d 689) in that it did not consider evidence now in the record which would justify the decision of the Commission as to the operation and maintenance of the fish trapping and egg taking facilities.
>
> "2. The Commission failed to follow the remand of the Court in said decision by failing and refusing to consider 'other evidence that can be produced' which would justify the decision of the Commission as to the operation and maintenance of the fish trapping and egg collecting facilities."

The Commission moves that we dismiss the petition or affirm, on the ground that the petition is frivolous. Pacific also moves to dismiss, on the same grounds. We conclude that the orders of June 23, 1965 and August 20, 1965 should be affirmed, and that, as to the orders of March 14 and August 19, 1963, the petition should be dismissed.

1. *The orders of March 14 and August 19, 1963.*

These orders were fully reviewed in our prior decision. The time for review has long gone by (16 U.S.C. § 8251 (b)). We affirmed them both except in the two respects set out at the beginning of this opinion. The Commission is bound by our decision. We think that we are also,[1] and we would not change it if we thought that we had the power.

---

1. *City of Tacoma v. Taxpayers*, 1958, 357 U.S. 320, 335-341 The Department says that one of its reasons for again raising the previously decided issues is that the Supreme Court may have denied certiorari solely because it agreed with the position of the Commission and Pacific that the petition for certiorari was premature. Whether that is so and what the consequences may be, are, we think, questions for that court.

2. *The June 23, 1965 order.*

This order complies with that portion of our mandate that suggested clarification of the 80 percent of capacity provision of Article 50 of the license, and denies a stay of the requirements of Article 49 for construction of a hatchery. The Department's petition does not attack either action. It only attacks the power of the Commission to impose less than 100% of the cost upon Pacific. This question we decided adversely to the Department in our previous decision.

3. *The order of August 20, 1965.*

We construe the Commission's decision, as the Commission does in its moving papers, as (1) an acquiescence in our previous decision, (2) a construction of it as a nullification of that part of Article 50 of the license reading "and of the permanent fish trapping, collecting, holding, and spawn-taking facilities constructed at Iron Gate Dam," and (3) a determination that no showing was made that there is evidence in the record, or other evidence that can be produced, that would justify, on grounds of public policy, imposing on Pacific any part of the cost of operating and maintaining the fish trapping and egg taking facilities. (See 333 F.2d at 696-697).

The Department says that the Commission did not follow our mandate, which it construes as requiring a hearing on the last question. To this the Commission presents two answers.

a. Insofar as the Department's petition sought such a hearing, it was not a petition for a rehearing. Rather, it was a petition for a hearing on this question, based upon the Department's construction of our mandate. The Department's own petition indicates an awareness of this. And

Pacific's motion to strike and answer to the Department's petition, filed with the Commission, forcefully brought the matter to the Department's attention. The statute says (16 U.S.C. § 8251(b)):

> "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do."

No rehearing, following the August 20, 1965 order, was sought. Thus, it can be said that the question is not properly before us.[2]

The Department says, however, that all that the Commission did was to deny a petition for a rehearing so designated by the Commission in its order and that therefore the law has been followed. The Department also says that it construed the June 23, 1965 order as a determination that there was evidence in the record justifying imposing on Pacific at least 80% of the cost of operating and maintaining the fish-trapping and egg-taking facilities, because the Commission did not strike from Article 50 the language imposing that obligation on Pacific. It also argues that it construed our mandate as requiring the Commission, *sua sponte*, to hold a hearing and receive evidence on the question, and that the failure of the Commission to so order, evidenced by the June 23, 1965 order, was, in substance, a refusal to follow the mandate, so that the Department's petition was for a rehearing as to that refusal. It asks for a summary remand to the Commission with directions that

---

2. In *Magnolia Petroleum Co. v. FPC*, 5 Cir., 1956, 236 F.2d 785, 789, *cert. denied*, 1957, 352 U.S. 968, and *Utah Power & Light Co. v. FPC*, 10 Cir., 1964, 339 F.2d 436 the courts refused to review orders made upon a petition for rehearing because no rehearing of those orders had been sought before the Commission. *Cf. FPC v. Colorado Interstate Gas Co.*, 1955, 348 U.S. 492.

such a hearing be held. It concludes that another petition for rehearing would be meaningless. We conclude that, because of the peculiar state of the record, there is indeed reasonable ground for the Department's failure to file another petition for a rehearing.

b. The Department misconstrues our mandates. We said that whether there is evidence in the record, or other evidence can be produced, is a question for the Commission, not for this court. This permits a further hearing; it does not require it. There is no showing that the Commission abused its discretion. No evidence, of either sort, was pointed to in the petition; there is nothing but a bare assertion. This, we think, is not enough to require a further hearing by the Commission. Absent some further showing, the Commission was entitled to assume that during the lengthly proceedings already had the Department had produced all of the relevant evidence that it could find. A reading of the petition confirms us in this belief.

The Commission would have done a neater job, and the subsequent confusion would have been avoided, if it had modified Article 50 of the license to conform to our mandate. As amended by the March 14, 1963 order (it has not since been amended), it reads:

> "Article 50. Licensee shall reimburse the State of California Department of Fish and Game for 80 percent of the combined annual cost of operation and maintenance of the facilities and appurtenances constructed pursuant to Article 49 *and of the permanent fish trapping, collecting, holding, and spawn-taking facilities and appurtenances constructed at Iron Gate Dam.* Should Licensee and the State of California Department of Fish and Game fail to agree on the amount to be paid by the Licensee for this purpose, the Commission reserves the right to determine the amount

of such annual payment, after notice and opportunity for hearing." (Emphasis added)

We held that the emphasized language was unauthorized on the record before us, and that the 80 percent language was unclear. The Commission, to conform to our mandate, could have inserted the clarification set out in its June 23, 1965 order in Article 50, and stricken the emphasized language. It did neither. But neither party has asked for this particular relief. We presume that the Commission could so amend, to conform to our mandate and to its orders of June 23 and of August 20, 1965, *sua sponte,* since it construes them as having this effect.

The statute (16 U.S.C. § 8251(b)) specifically authorizes us to modify the Commission's order. We think that we should do so, to make explicit and clear what the Commission tells us that it intended. So doing will also make clear the result of the proceedings to date, to the end that, if the Department again seeks certiorari, there will be no doubt as to the finality of our own disposition of the proceeding.

As it relates to the orders of March 14 and August 19, 1963, the petition is dismissed. The order of June 23, 1965 is affirmed. The order of August 20, 1965 is modified by inserting therein, immediately after the words "The Commission Orders:" the following:

"The license for Project No. 2082, as amended, is further amended to provide as follows:

"Article 50. Licensee shall reimburse the State of California Department of Fish and Game for 80 percent of the combined annual cost of actual operation and maintenance whether at full capacity or a lesser capacity of the facilities and appurtenances constructed pursuant to Article 49. Should Licensee and the State of California Department of Fish and Game fail to agree on the amount to be paid by the Licensee for

this purpose, the Commission reserves the right to determine the amount of such annual payment, after notice and opportunity for hearing."

As so modified, the order is affirmed.

The motion of the Department for a summary remand is denied. Both parties are agreed that the records in the prior proceedings in this court, our Nos. 18,853 and 18,954, should be made a part of the record in this proceeding. It is so ordered. The motion of the Commission for an extension of time in which to certify the record in this case to the court is, pursuant to the suggestion of its counsel, denied.